Office-Supreme Court, U.S.
FILED
SEP 27 1983
ALEXANDER L. STEVAS,
CLERK

No.82-I952

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,I983

---

LEO E.BALK, PETITIONER,

v.

UNITED STATES INTERNATIONAL COMMUNICATION AGENCY

---

On Petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

# PETITIONER'S REPLY TO MEMORANDUM IN OPPOSITION FOR THE RESPONDENT

---

Leo E.Balk, Petitioner,

2519 Holman Ave.
Silver Spring,Md.20910

(301)-587-0091

TABLE OF AUTHORITIES


| | Page |
|---|---|
| **Cases:** | |
| Boyd v.Secretary of the Navy, No.82-6006 (CA-II,I983) | 5 |
| Clarkson v.IRS, 678 F2d I368 (CA-II,I982) | 6 |
| Parks v.IRS, 6I8 F2d 677 (CA-IO,I980) | 6 |
| Savarese v.HEW, 479 FSupp.304 (DC ND Ga,I979) | 5,6 |
| Zeller v.U.S., 467 FSupp.487 (DC ED NY,I979) | 5 |
| **Federal statutes and regulations:** | |
| The Privacy Act of I974 (5 USC,Sec.552a) | I,2,3, 4,5,6,7 |
| U.S.International Communication Agency System of Records "USICA--53",I980 | 2,3 |

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 82-1952

---

LEO E. BALK, PETITIONER,

v.

UNITED STATES INTERNATIONAL COMMUNICATION AGENCY

---

On Petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

# PETITIONER'S REPLY TO MEMORANDUM IN OPPOSITION FOR THE RESPONDENT

---

I. Respondent has not been able to refute arguments brought up in the Petition and based on the exact language of the Privacy Act, on the federal rules promulgated under its authority, and on its legislative history. The manifest weakness of the Respondent's legal position logically led to his cavalier treatment of facts in the pe-

titioned case. However, as the record will show:

Ia. Petitioner's official written request under the Privacy Act to release the record at issue was mailed to the Agency on June 27, I980. As long as the system of records "USICA--53" officially published by the Agency was in effect on that day (Pet.,App.B,pp.I-4), the legal presumption must be that the record and all other documents relevant to the request were incorporated into the system three days later when the Agency received the request through the U.S.mail. (See Pet., App.B,p.5 - Categories of individuals and categories of records in the system). Respondent was not able to rebut this presumption. Mr.Demitz, whose so-called "uncontested" affidavit (see infra) was executed more than one year later (on July 23,I98I), was an official in charge of a broadcasting unit and knew nothing about the Privacy Act or the systems of records maintained by the Agency. On July 3I,I98I Respondent also had Mr.Charles Jones,Jr. to execute an affidavit in this case. Mr.Jones was then and is now the Privacy-Freedom of Information Acts Co-

ordinator with the Agency. He was the official to know. But despite that the argument of "the record not being in a system of records" had by that time become the only Respondent's defense in the District Court, Mr. Jones' affidavit contains no statement in support of this argument. Mr.Jones could not make such statement under oath: there were no reasons for the Agency to treat Petitioner's request under Privacy Act any differently from other such requests and not to place it in the "USICA-53". And even if the Agency did make this unexplainable exception for Petitioner, in accordance with 5 USC, Sec.552a(e)(G) it should have immediately notified him that his request and all relevant documents were not placed into the system of records.

Ib. Affidavits of both Mr.Demitz and Mr. Jones were attached to the Respondent's motion to dismiss or for summary judgment which was filed with the District Gourt on about August I,I98I. With his response to that motion, on October I3,I98I, Petitioner filed with the Court his own affidavit executed on October 3,I98I by which he timely and explicitly contested affidavit testimony

of both officials, having stated that their testimony "gave a distorted picture of some of material facts at issue in this case..."

Ic. At the very outset of his correspondence with the Agency Petitioner notified its officials that the record at issue was a malicious libel against him. For a long time Petitioner repeatedly tried to discuss and to settle this matter within the Agency, but all his written and oral complaints and requests for relief were completely and contemptuously ignored by its officials. When the District Court received Respondent's motion for protective order, the judge issued the order to block all discovery by Petitioner without even waiting for his response to the motion as provided by the rules of the District Court. With all this information in the record Respondent tries to put on Petitioner the blame for failure "to support his general claims with specific allegations", etc. Moreover, this attempt runs contrary to the Privacy Act: intent and/or willfulness of the Agency, which are prerequisites of its liability for damages, must, under 5 USC, Sec. 552a(g)(4), be deter-

mined by the Court at the trial. These material issues of fact "cannot be disposed of summarily on the papers before the Court." See Zeller v. U.S., 467 FSupp.487 (I979), at 503.

The factual background in this case presented in Petition and in this Reply has been confirmed by documents in the record and supported by argument before the Court of Appeals. Its affirmance of dismissal despite of a number of clearly defined material issues of fact between the parties was therefore inappropriate under the law and strikingly unfair to Petitioner.

2. None of the cases cited in Respondent's memorandum raises issues present in the petitioned case: whether or not Plaintiff's record was in a system of records or whether Defendant violated specific federal rules promulgated under the authority of the Privacy Act. None of these cases answers questions presented to this Court. And while Boyd v.Secretary of the Navy, No.82-6006 (II-th Cir.,I983), is plainly irrelevant because Plaintiff had a full trial in the District Court, Savarese v. HEW, 479 FSupp.304 (I979), supports Petitioner's po-

sition that his claim under 5 USC,Sec.552a (e)(5) does represent a genuine issue of material fact for litigation and cannot be disposed of summarily. See Savarese, supra, [3], at 306-307.

Clarkson v. IRS, 678 F2d I368 (I982), only adds confusion and uncertainty over the meaning of different subsections of the Privacy Act. The Eleventh Circuit came to a conclusion that subsections (d)(2), (d)(3), and (e)(7) did not require a record to be in a system of records to make Plaintiff's allegations sustainable in court, whereas subsections (e)(I) and (e)(5) did. Clarkson, supra, [9,I0] at I376, [II] at I377. However, the plain meaning of the clear language in (d)(2) and (3), when compared with that of (e)(I) and (5), makes this differentiation extremely unpersuasive.

The legislative history of the Privacy Act leaves no doubt about clear intent of Congress to curtail endless abuses of the Government's power to collect, maintain, and use personal records of all sorts on individuals. See,for example, Parks v. IRS, 6I8 F2d 677, footnote I on 68I, also Pet.pp.9,I0. Subsection (e), in the clear language of

its paragraphs (I)(2)(3)(5)(6)(8)(9),has been designed to prevent certain abuses in regard to "all records" or "any record" or "information" about "an individual" or "each individual". These words of English need no legal interpretation. Neither Congress, in passing the Privacy Act, meant to sanction judicial restriction of the rights of persons protected by the statute with surgeries of summary dismissals of legally valid allegations, which, if being proved at the trial, may somehow embarrass government officials. The motto of "equal justice under law" must first be practiced in courts of all places.

Petitioner respectfully requests the Court to grant his Petition and to reverse the judgment of the Court of Appeals.

Leo E.Balk,
Petitioner

September 1983